89- 1674
No.

In the
Supreme Court of the United States.

OCTOBER TERM, 1989.

ROSE CAROTA,
PETITIONER,

v.

THE CELOTEX CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari.

NEIL T. LEIFER,
STEPHEN J. KIELY,
THORNTON & EARLY,
200 Portland Street,
Boston, Massachusetts 02114.
(617) 720-1333

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Did the United States Court of Appeals for the First Circuit fail to follow the established precedent of this Court by holding that the admissibility of evidence of the Petitioner's pretrial settlements with joint tortfeasors was governed by the law of Massachusetts and not by Federal Rule of Evidence 408?

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Petition for Writ of Certiorari.

The Petitioner, Rose Carota, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above referenced matter on January 11, 1990.

Opinions Below.

The opinion of the First Circuit Court of Appeals at bar is reported at 893 F.2d 448 (1st Cir. 1990) and reproduced in the Appendix hereto (Appendix at 1A). The trial court's judgment was entered by the clerk on November 18, 1988.

Jurisdiction.

This Petition for Certiorari is taken pursuant to a judgment of the United States Court of Appeals for the First Circuit, entered on January 11, 1990, which affirmed a judgment entered in favor of the Respondent, The Celotex Corporation, by the United States District Court for the District of Massachusetts. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions in Issue.

This Petition for Certiorari involves the application of Rule 408 of the Federal Rules of Evidence in civil actions arising under 28 U.S.C. § 1332. Federal Rule of Evidence 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Statement of the Case.

This is a Petition for Writ of Certiorari for review of a decision by the United States Court of Appeals for the First Circuit that the admissibility of settlement evidence with joint tortfeasors in a diversity case is governed by the law of Massachusetts and not by Rule 408 of the Federal Rules of Evidence. The decision below was rendered in an appeal taken following a jury verdict and judgment in the United States District Court for the District of Massachusetts in favor of the Respondent, The Celotex Corporation. That judgment was affirmed by the Court of Appeals on January 11, 1990.

The Petitioner, Rose Carota, is the executrix of the estate of her late husband, Elio Carota. The case below sought damages for wrongful death, personal injuries and loss of consortium arising from Elio Carota's injurious exposure to asbestos in the course of his employment at the Fore River Shipyard in Quincy, Massachusetts. Mr. Carota was employed at the shipyard as an insulator, and in that capacity directly handled asbestos-containing products manufactured by a number of asbestos companies, including the Respondent's predecessor in interest. Each of these companies was named as a defendant in the Complaint.[1]

Prior to trial, the Petitioner settled her claims with all but two of the defendants named in the Complaint. The case proceeded to trial in November, 1988, against the Respondent, The Celotex Corporation.[2] At the start of the trial, the Respon-

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[1] The action was brought in the United States District Court for the District of Massachusetts pursuant to the District Court's diversity jurisdiction. 28 U.S.C. § 1332. The Petitioner is a citizen of the Commonwealth of Massachusetts and each of the defendants was incorporated and maintained its principal place of business in a state other than Massachusetts.

[2] The claims against the other defendant, Johns-Manville Sales Corporation, were previously severed after that defendant sought protection under the federal bankruptcy laws.

dent moved *in limine* for a ruling on the admissibility of the Petitioner's pretrial settlements with co-defendants. The Petitioner opposed the motion on the grounds that the admission of such evidence was expressly barred by Rule 408 of the Federal Rules of Evidence. Rule 408 provides in pertinent part:

> Evidence or (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

The Petitioner pointed to the stated public policy against admitting evidence of settlements: they are "irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position . . . [and because its admission would undermine] the public policy favoring compromise and settlement of disputes." Federal Rule of Evidence 408, Advisory Committee's Notes.

Notwithstanding the express language of Federal Rule of Evidence 408, and the strong policies which underlie it, the Honorable Walter J. Skinner of the United States District Court for the District of Massachusetts granted the Respondent's motion. The District Court concluded that the admissibility of the settlement evidence was governed by the law of Massachusetts, which permits the introduction of such evidence.

At the close of the Respondent's case, the Respondent offered the evidence of the Petitioner's settlements with co-defendants. A general verdict was returned by the jury in favor of the Respondent and judgment was entered. The verdict was rendered without special interrogatories. Therefore, there is no way to find with fair assurance that the judgment was not

substantially swayed by the jury's knowledge of the pretrial settlements.

The Petitioner filed a timely appeal of the judgment in the United States Court of Appeals for the First Circuit. The sole issue on appeal was the admissibility of the settlement evidence, the admission of which substantially prejudiced the Petitioner's right to a fair trial. On January 11, 1990, the First Circuit held that the admissibility of the settlement evidence was governed by state law and not by the Federal Rules of Evidence, and therefore affirmed the judgment of the District of Massachusetts.

On April 10, 1990, the Petitioner filed this Writ of Certiorari in order to obtain review of the First Circuit's construction of the application of the Federal Rules of Evidence in cases arising under a district court's diversity jurisdiction.

Reasons for Granting Writ of Certiorari.

THE COURT OF APPEALS FOR THE FIRST CIRCUIT HAS FAILED TO FOLLOW THE ESTABLISHED PRECEDENT OF THIS COURT REGARDING THE CONSTITUTIONALITY OF A FEDERAL RULE WHICH CONFLICTS WITH STATE LAW.

This Petition raises for the first time whether the Federal Rules of Evidence can be applied constitutionally in diversity cases when they conflict with the rules of evidence of the forum state. In the matter before the Court, the First Circuit Court of Appeals held that the admissibility of settlement evidence in this diversity case was governed by the law of Massachusetts, which allowed the introduction of such evidence, and not by Federal Rule of Evidence 408, which would have expressly excluded it. If Federal Rule of Evidence 408 governed, as the Petitioner argued, then the settlement evidence

was inadmissible because of its highly prejudicial nature and the First Circuit was bound by its own precedent to vacate the judgment and remand the case for a new trial. The First Circuit's holding presents the classic error of supplanting a federal rule with state law when the federal rule merely alters the mode of enforcing state-created rights. In reaching this holding, the First Circuit failed to follow the established precedent of this Court. *Hanna* v. *Plumer*, 380 U.S. 460 (1965); *Walker* v. *Armco Steel Corp.*, 446 U.S. 740 (1980).

The decision of the First Circuit "has so far departed from the accepted and usual course of proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17(a). The First Circuit has failed to give effect to the Federal Rules of Evidence in the matter at bar in precisely the same manner and circumstance that the court's failure to recognize the validity of Federal Rule of Civil Procedure 4(d)(1) gave rise to this Court's seminal decision in *Hanna* v. *Plumer*. Review of the First Circuit's decision will not only correct the injustice done to the Petitioner in this case by the improper admission of highly prejudicial evidence, but will also confirm the constitutionality of the Federal Rules of Evidence in diversity cases.

The sole issue on appeal before the First Circuit was whether the admissibility of out of court settlement evidence was governed by Federal Rule of Evidence 408[1] or the law of Massachu-

[1] Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention

setts.[4] The First Circuit applied the rule of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) and its progeny to hold that the Massachusetts rule of evidence displaced Federal Rule of Evidence 408 because the court concluded that the federal rule impinged on some substantive state policy embodied in the state rule. The standard applied by the First Circuit, however, was simply not the appropriate test of the validity and application of a federal rule. *Hanna* v. *Plumer*, 380 U.S. at 470; *Walker* v. *Armco Steel Corp.*, 446 U.S. at 747-748.

The test applied by the First Circuit did not govern in this case because there was a federal rule which expressly covered the point in dispute. The fundamental flaw in the First Circuit's decision was

> the incorrect assumption that the rule of *Erie Railroad Co.* v. *Tompkins* constitutes the appropriate test of the validity and therefore the applicability of [a federal rule]. *The Erie rule has never been invoked to void a Federal Rule.* It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that Erie commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which cov-

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of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

[4] Although the rules of evidence are not codified under Massachusetts law, the admissibility of evidence with joint tortfeasors is provided for in *Tritsch* v. *Boston Edison Company*, 363 Mass. 179 (1973).

> ered, the point in dispute, *Erie* commanded the enforcement of state law.

Hanna v. *Plumer*, 380 U.S. 469-70 (emphasis added).

There is no question that Federal Rule of Evidence 408 was broad enough to cover the issue in dispute. *See, e.g., McInnis* v. *A.M.F., Inc.*, 765 F.2d 240, 247 (1st Cir. 1985) (Rule 408 governs the admissibility of settlement between a litigant and a third party). *See, also* Federal Rule of Evidence 408, Advisory Committee's Notes. Accordingly, the proper test of the applicability of the federal rule at issue in the case at bar was not the rule of *Erie*, but the test set forth in *Hanna* v. *Plumer*:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively un-guided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court and Congress erred in their *prima facie* judgment that the Rule in question transgresses neither the term of the Enabling Act nor constitutional restrictions.

Hanna v. *Plumer*, 380 U.S. at 471 (construing the constitutionality of Federal Rule of Civil Procedure 4(d)(1) in a diversity case). *Hanna* instructs that where the issue is covered by a federal rule, the sole question for the court is whether the enactment of the rule was within the constitutional power of Congress.[5] *Hanna* v. *Plumer*, 380 U.S. at 470-72; *Walker* v. *Armco Steel Corp.*, 446 U.S. at 748.

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[5] Federal rules promulgated by the Supreme Court pursuant to the Rules Enabling Act, must also come within the limitations of that Act prohibiting rules which "abridge, enlarge or modify any substantive right . . ." 28 U.S.C. § 2072. *Hanna* v. *Plumer*, 380 U.S. at 470-72 (applying such restrictions to the Federal Rules of Civil Procedure). That limitation does not apply to the Federal Rules of Evidence, which were enacted directly by Congress.

Moreover, the validity of the federal rule is established if it can "rationally" be classified as procedural, even though it may differ from the comparable state rule. As this Court observed in *Hanna*, inherent in Congress' power to create federal courts is the power to promulgate rules for application therein.

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Hanna v. *Plumer*, 380 U.S. at 472. The enactment of the Federal Rules of Evidence was unquestionably a valid exercise of that power.

The test set forth in *Hanna* v. *Plumer* applies with equal force to the Federal Rules of Evidence. *Flaminio* v. *Honda Motor Co.*, 733 F.2d 463, 470-72 (7th Cir. 1984); *Fasanaro* v. *Mooney Aircraft Corp.*, 687 F. Supp. 482, 485 n.3 (N.D. Cal. 1988); *Rioux* v. *Daniel Intern. Corp.*, 582 F. Supp. 620, 624-25 (D. Me. 1984). Indeed, even the First Circuit had previously recognized "the test to be fully applicable to the Federal Rules of Evidence as well." *McInnis* v. *A.M.F., Inc.*, 765 F.2d 240, 245 n.5 (1st Cir. 1985).[6]

Courts that have applied the *Hanna* test to the Federal Rules of Evidence have consistently found those rules to be constitutional. For example, in *Flaminio* v. *Honda Motor Co.*, 733

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[6] "[T]he presumption of validity may be even stronger in the case of the Federal Rules of Evidence, since unlike the rules of civil procedure, they were actually written rather than merely approved by Congress." *McInnis* v. *A.M.F., Inc.*, 765 F.2d at 245 n.5. *Accord, Fasanaro* v. *Mooney Aircraft Corp.*, 687 F. Supp. at 485 n.3.

F.2d at 471-72, the Seventh Circuit held that Federal Rule of Evidence 407 ("Subsequent Remedial Measures") had both procedural and substantive considerations, and therefore, under *Hanna*, could be applied constitutionally in a diversity case even though the forum provided a contrary rule. *Accord, Fasanaro* v. *Mooney Aircraft Corp.*, 687 F. Supp. at 483-86; *Rioux* v. *Daniel Intern. Corp.*, 582 F. Supp. at 624-25 (also analyzing Rule 407). *But see, Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917 (10th Cir.) *cert. denied*, 469 U.S. 853 (1984) (classifying Rule 407 as purely substantive).

Federal Rule of Evidence 408 has also been applied constitutionally in the face of a contrary state rule. *McHann* v. *Firestone Tire & Rubber Co.*, 713 F.2d 161 (5th Cir. 1983). The procedural considerations which underlie Federal Rule of Evidence 408 establish its constitutionality in diversity cases. As the Fifth Circuit held in *McHann*, "the efficient use of court time and resources is a federal concern legitimately within the reach of the federal authority and that Rule 408 promotes efficiency by fostering out-of-court settlements." *Id.* at 166 n.10. *Accord, McInnis* v. *A.M.F.*, 765 F.2d at 247.

The First Circuit failed to apply the *Hanna* test when it considered the validity and application of Federal Rule of Evidence 408 to the case at bar. Although the court recognized that the issue of "[o]ut of court settlements [was] 'rationally capable of classification as either' substantive or procedural," *Carota* v. *Johns Manville Corp.*, 893 F.2d 448, 450 (1st Cir. 1990) reproduced and attached to the Petition at Appendix 1a, at 4a, it did not apply the *Hanna* test. Instead, the court applied a different test: whether the federal rule "impinge[d] on some substantive state policy embodied in the state rule." *Id.* at 450-51. That was error.[7] In reaching this result, the First Circuit

[7] Even under the improper test adopted by the First Circuit, the court should have concluded that Federal Rule of Evidence 408 governed and precluded the admission of the pretrial settlements. As the Petitioner proposed, the District

ignored this Court's clear admonition in *Hanna* v. *Plumer* that a federal rule is not unconstitutional simply because it may in some way affect a state created right. *Id.* at 473.[8] To hold that a Federal Rule of Evidence "must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel the Constitution's grant of power over federal [rulemaking] or Congress' attempt to exercise that power." *Id.* at 473-74. That is precisely the result of the First Circuit's decision at bar.

The federal/state distinction at bar is precisely the type of minor alteration of the mode of enforcing state-created rights that this Court made clear in *Hanna* does not result in the invalidation of a federal rule. The difference between the procedure under Rule 408 and state law regarding the handling of pretrial settlements was simply the mode by which the state substantive policy of preventing double recovery was to be accomplished. Indeed, the difference between the state and federal practice was actually just the method by which a damage award is adjusted to reflect undisputed pretrial settlements. Massachusetts law provides that the jury makes the adjustment; the practice under Rule 408 would leave that arithmetic to the

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Court could have deducted the amount of the settlement from the verdict. This would have achieved the state substantive policy of avoiding double recovery without undermining the legitimate goals of the federal rule. Thus, the application of Federal Rule of Evidence 408 would not have impinged on any substantive state policy.

[8] In contrast to the First Circuit's decision below, the Seventh Circuit has correctly applied the test in *Hanna* v. *Plumer* to the Federal Rules of Evidence.

> We are reluctant to cast a cloud over the whole federal rule making enterprise and open a new chapter in constitutional jurisprudence by holding that a procedural rule is beyond even the power to Congress to enact for application to diversity cases, because the rule affects substantive questions that the *Erie* doctrine reserves to the states.

Flaminio v. *Honda Motor Co.*, 733 F.2d 463, 473 (7th Cir. 1984) (upholding the constitutionality of Rule 407).

trial court.[9] The latter "is the proper procedure for guarding against over compensation when Rule 408 precludes the admission of a settlement agreement." *McInnis* v. *A.M.F., Inc.*, 765 F.2d at 251. *Accord, McHann* v. *Firestone Tire & Rubber Co.*, 713 F.2d at 166. Surely, the choice between the state method and the procedure used when Rule 408 precludes the admission of settlement evidence "would be of scant, if any, relevance to the choice of the forum . . ." *Hanna* v. *Plumer*, 380 U.S. at 469. Therefore, the application of Federal Rule of Evidence 408 in the case at bar would not have encouraged forum shopping or resulted in the inequitable administration of the laws. *Id.* at 468.

The issue at bar satisfies the two-prong test formulated in *Hanna* v. *Plumer*. Federal Rule of Evidence 408 was broad enough to cover the admissibility of the settlements in the case at bar and the issue was rationally capable of classification as either substantive or procedural. Accordingly, under *Hanna*, the First Circuit should have concluded that Federal Rule of Evidence 408 was valid and controlled the admissibility of the pretrial settlements. Further, the court would then have been compelled to conclude by its own precedent that the admission of the settlement evidence constituted prejudicial error which mandated a new trial. *McInnis* v. *A.M.F., Inc.*, 765 F.2d at 251. *Accord, McHann* v. *Firestone Tire & Rubber Co.*, 713 F.2d 161, 166 (5th Cir. 1983).

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[9] The Massachusetts rule of admissibility is therefore not one of those rare evidentiary rules which is so bound up with state substantive law that federal courts sitting in diversity must apply it to give full effect to the state's substantive policy. *Compare, Conway* v. *Chemical Leaman Tank Lines, Inc.*, 540 F.2d 837 (5th Cir. 1976) (admission of evidence of remarriage to prevent misleading impression of continuing widowhood expressly provided for under the Texas wrongful death statute); *DiAntonio* v. *Northampton Accomack Memorial*, 628 F.2d 287 (4th Cir. 1980) (admissibility of report of medical malpractice panel was so essential to ensure meaningful implementation of Virginia Medical Malpractice Act that its admission was expressly provided for in the statute).

Conclusion.

The First Circuit has modified the constitutional test for the validity of federal rules as formulated in *Hanna* v. *Plumer*, 380 U.S. 460 (1965). In doing so, the court has ignored the established precedent in both this Court and its own circuit. The First Circuit has made this substantial departure from established precedent to resolve a conflict between state and federal law that could have been readily accommodated by a mechanical change in court process. This Court should grant the Petition for Writ of Certiorari, vacate the decision below, and remand this case to the First Circuit for further review consistent with the standards set forth in *Hanna* v. *Plumer*.

Respectfully submitted,

NEIL T. LEIFER,
STEPHEN J. KIELY,
THORNTON & EARLY,
200 Portland Street,
Boston, Massachusetts 02114.
(617) 720-1333

Appendix.

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Appendix.

Rose Carota, Plaintiff, Appellant,

v.

Johns Manville Corp., et al.,
Defendants, Appellees.

No. 89-1286.

United States Court of Appeals,
First Circuit.

Heard Sept. 12, 1989.

Decided Jan. 11, 1990.

Neil T. Leifer, with whom Thornton & Early, Boston, Mass., was on brief, for plaintiff, appellant.

Leonard F. Zandrow, Jr., with whom Richard L. Neumeier, Thomas P. O'Reilly, Janet L. Maloof, and Parker, Coulter, Daley & White, Boston, Mass., were on brief, for defendants, appellees.

Before BOWNES, TORRUELLA and MAYER,* Circuit Judges.

TORRUELLA, Circuit Judge.

Plaintiff-appellant appeals from a jury verdict in a wrongful death case. She argues that the United States District Court for the District of Massachusetts improperly admitted evidence of out of court settlements in violation of Federal Rule of Evidence 408 causing substantive prejudice and therefore requests a new trial.

Elio Carota and his wife, Rosa, commenced this action in 1982. In 1986, Elio Carota died, allegedly of asbestosis, and Mrs. Carota amended the complaint to reflect her husband's

* Of the Federal Court, sitting by designation.

death. The trial began in November, 1988. By that time, Mrs. Carota had already settled with the original defendants, leaving appellee, The Celotex Corp. (Celotex), as the only remaining defendant.

At the beginning of the trial, Celotex moved to introduce into evidence the amount of Mrs. Carota's settlements with the other defendants. Celotex argued that under Massachusetts law a defendant is entitled to show evidence of out of court settlements in joint tortfeasor cases. *Tritsch v. Boston Edison Company*, 363 Mass. 179, 182, 293 N.E.2d 264, 267 (1973).

Mrs. Carota opposed this motion, arguing that Fed.R.Evid. 408 precludes admitting evidence of settlements with third parties. Federal Rule of Evidence 408 provides in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

She argued that settlements are "irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position . . . [and because its admission would undermine] the public policy favoring the compromise and settlement of disputes." Rule 408: *Advisory Committee Notes on Proposed Rules*.

The district court granted Celotex's motion, and Celotex concluded its case by publishing to the jury the stipulated fact that Mrs. Carota had received $98,471 in settlement with other defendants. This settlement amount appeared on the general verdict form following the space where the jury was to enter an award of compensatory damages. After the jury returned a verdict for Celotex, Mrs. Carota brought this appeal.

The issue on appeal is whether the district court erred in admitting the evidence of third party settlements, and, if erroneously admitted, whether the presence of this evidence warrants a new trial.

DISCUSSION

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), the Supreme Court held that a federal court sitting in a diversity case must apply state substantive law and federal procedural law. While "no one doubts federal power over procedure," *Id.* at 92, 58 S.Ct. at 828 (Reed, J., concurring) "federal courts and Congress are constitutionally precluded from displacing state substantive law with federal substantive rules in diversity actions." *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 244 (1st Cir. 1985). *See also Ricciardi v. Children's Hospital Medical Center*, 811 F.2d 18, 21 (1st Cir. 1987). This substantive/procedural dichotomy has long served as a guiding light for federal courts deciding issues of federalism.

"[L]aws which fix duties, establish rights and responsibilities among and for persons . . . are 'substantive laws' in character while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are 'procedural laws'." *Black's Law Dictionary* 1083 (5th ed. 1979). Generally, rules of evidence are procedural, since they describe the admissibility, relevancy, weight and sufficiency of information utilized at trial to define substantive rights. *See generally* 21 C. Wright & K. Graham, *Federal Practice and Procedure*, §§ 5001 *et seq.* (1980). The law of damages, however, is substantive since it prescribes what, if any, money a plaintiff will receive as compensation for injury. "Damages are an element of plaintiff's case. . . ." *Goldstein v. Kelleher*, 728 F.2d 32, 38 (1st Cir. 1984). *Heddinger v.*

Ashford Memorial Community Hosp., 734 F.2d 81 (1st Cir. 1984). *See also, e.g., Cordeco Development Corp. v. Santiago Vásquez*, 539 F.2d 256, 262 (1st Cir. 1976). *Colonial at Lynnfield Inc. v. Sloan*, 870 F.2d 761 (1st Cir. 1989).

Certain matters do not fall neatly into the substantive/procedural dichotomy, but rather fall within a twilight zone between both classifications. The present case presents such a matter. Out of court settlement evidence is "rationally capable of classification as either" substantive or procedural. *Hanna v. Plumer*, 380 U.S. 460, 472, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965). Thus, the traditional *Erie* analysis cannot resolve the dispute. But, the *Erie* doctrine has evolved beyond its traditional confines, to the point where this Court held in *Ricciardi v. Children's Hospital Medical Center*, 811 F.2d at 21, that the state rule need not always displace the federal rule, unless application of the federal rule "impinges on some substantive state policy embodied in the state rule." *Id.* Therefore, the fact that both parties concede the issue is substantive, does not end our inquiry.

Appellant argues that the state policy at stake is prevention of double recovery, and that this Court can accommodate this policy while still applying Rule 408. In *Tritsch v. Boston Edison Company*, 363 Mass. 179, 182, 293 N.E.2d 264, 267 (1973), a joint tortfeasor case, the Massachusetts Supreme Judicial Court (SJC), concerned about a plaintiff receiving "remuneration in excess of his actual damages" held that "[i]n mitigation of damages, a defendant is entitled to show in evidence the amount of money paid or promised to the plaintiff by a joint tortfeasor on account of the same injury." In the same case on appeal, asking for a reduction in the verdict, the SJC stated:

> "[s]everal of our cases indicate that settlement with a joint tortfeasor not a party to the action may be disclosed to the jury in order that they may adjust their verdict. . . . These cases suggest that the jury should subtract the amount received in settlement from the total damages in arriving at their verdict."

Boston Edison Company v. Tritsch, 370 Mass. 260, 266, 346 N.E.2d 901, 905 (1976).

The appellant contends that Massachusetts law, relying on the cases cited above, points to a substantive policy of prevention of double recovery. To implement this policy, appellant argues Massachusetts instituted a procedural mechanism of allowing out of court settlements into evidence and requiring the jury itself to deduct these amounts from their verdict. Under this interpretation, application of the Rule 408 procedure does not impinge on the state substantive policy of prevention and double recovery. By withholding out of court settlement information from the jury, and then deducting from the verdict the amount of any such settlement, the state policy, appellant contends, can be reconciled with the federal rule. *See McHann v. Firestone & Rubber Co.*, 713 F.2d 161, 166 n.10 (5th Cir. 1983).

Appellee argues that Massachusetts law is clearly substantive because it directly affects the award of damages and opines that application of the federal law would indeed violate substantive state policies. *See Tritsch v. Boston Edison Co.*, 363 Mass. 179, 182, 293 N.E.2d 264, 267 (1973); *Boston Edison Company v. Tritsch*, 370 Mass. 260, 266, 346 N.E.2d 901, 905 (1976). Appellee contends that in Massachusetts, the jury is entitled to hear out of court settlement evidence and is expected to adjust their verdict accordingly.

"Fact finding is the essence of the jury function," *Estate of Spinosa*, 621 F.2d 1154, 1160 (1st Cir. 1980), and the jury must

make the determination of damages. *See McDonald v. Federal Laboratories, Inc.*, 724 F.2d 243, 247 (1st Cir. 1984). Procedural issues are the province of the court. Consequently, the decision to grant juries the opportunity to hear settlement evidence reflects a view of that evidence as substantive, because the juries' hearing of this evidence affects the substantive rights of plaintiffs to damages. Otherwise, it would have been excluded as procedural. Allowing a deduction of out of court settlements from a verdict, while not informing the jury of the amounts of those settlements, deprives the jury of their state law entitlement to hear the evidence, thwarts the rationales behind Massachusetts Supreme Judicial Court decisions, and usurps from that court the power to formulate its own policies and to give force to its own law.

As previously stated, the issue of out of court settlements as evidence falls within the twilight zone between substance and procedure. But when a state permits the admission of out of court settlement evidence with the intent that such admission affect the damage award, then we must deem the issue substantive. If a state has a substantive policy to have a jury hear out of court settlement evidence when determining damage awards, we will not contravene that state law in a diversity action. The court below recognized that Massachusetts law required the jury to "[t]ake them [out of court settlements] into consideration when an award is made." We agree.

Affirmed.